

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



February 19, 2004

TO: ALL PARTIES OF RECORD IN RULEMAKING 02-01-011

Decision 04-02-024 is being mailed without the Dissents of
Commissioner Wood and Commissioner Lynch.

Sincerely,

/s/ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG/bb1

I. Attachment

Decision 04-02-024 February 11, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the
Implementation of the Suspension of Direct
Access Pursuant to Assembly Bill 1X and
Decision 01-09-060.

Rulemaking 02-01-011
(Filed January 9, 2002)

OPINION REGARDING PETITION TO MODIFY DECISION 03-04-057

By this order, we grant the Petition for Modification filed on September 25, 2003 by Albertson's Inc., the Alliance for Retail Energy Markets and the Western Power Trading Forum (collectively, the "Joint Parties"). The Joint Parties seek an order modifying two provisions of Decision (D.) 03-04-057, issued on April 17, 2003. As explained below, we grant the requested modification relieving Energy Service Providers (ESPs) of the requirement to sign an affidavit attesting to the compliance of Direct Access (DA) customers with DA load suspension rules. In addition, we grant the requested modification seeking to eliminate the requirement that a customer may relocate DA load to a new location only on a "one-for-one" or "account-by-account" basis. We instead permit relocations of DA load so long as there is no net increase in the customer's amount of total eligible DA load within each utility service territory.

Comments in response to the Petition to Modify were filed on October 27, 2003. Comments were filed by Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas &

Electric (SDG&E). On November 5, 2003, the Joint Parties filed a third-round reply to parties' comments, pursuant to authorization granted by the Administrative Law Judge.

II. Background

D.03-04-057 addressed an earlier petition of Albertson's, Inc. (Albertson's) to modify D.02-03-055, the Commission's decision adopting rules for implementing the temporary suspension of Direct Access (DA) required under Assembly Bill (AB) 1X. In that petition, Albertson's had requested that rules adopted in D.02-03-055 be modified to allow existing DA customers to add new locations or accounts to DA service provided there is no net increase in the amount of load that is served under DA as of September 20, 2001. The April 17 Decision also discussed the requirement calling for the DA customer and its ESP to sign an affidavit that would state, under penalty of perjury, that the customer's aggregate DA load will not increase by virtue of the relocation or replacement of facilities.

In accordance with D.03-04-057, a proposed affidavit¹ was circulated by SDG&E, PG&E and SCE (collectively, the IOUs). It consists of two parts, an ESP Declaration and a Customer Declaration, as well as an attached form entitled Customer Location Relocation/Replacement Declaration. The language which relates to the subject of this petition is contained in paragraph 4 of the ESP Declaration, and reads as follows:

¹ Petitioners attached a copy with their Petition, as Exhibit B, with suggested modification indicated through the use of underlining or strikethroughs.

4. The change in service from the Current Location to the new location will cause no net increase in Customer's aggregate direct access load in effect as of September 20, 2001 for all Customers' facilities that have been relocated or replaced within utility's existing service territory.

The Joint Parties argue that the design of the affidavit has proven to be problematical, thus prompting their petition for modification regarding two issues, as discussed below. The Joint Parties request that the Rule 1 language requiring ESPs to attest to no net change in load on behalf of their customers be eliminated, and that such attestation be required solely of the customer. Second, Joint Parties propose that Rules 5 and 7 be modified to remove the requirement that the customer attest that the replacement or relocation facilities will not cause a net increase in the customer's aggregate amount of load that was eligible to be served by DA as of September 20, 2001. Joint Parties argue that the calculation of any net increase should not apply solely to those accounts that have been relocated. Joint Parties argue that the requested clarifications are necessary for affected DA customers and the ESPs who serve them to move forward with the relocations that were the subject of the original Albertson's petition for modification.

III. ESP Affidavit Requirements

A. Positions of Petitioners

D.03-04-057 requires that ESPs sign, under penalty of perjury, an affidavit that the change in location will have no net increase in Customer's aggregate DA load as of September 20, 2001. Joint Parties contend that it is fundamentally impossible, however, for ESPs to adhere to such a requirement because ESPs are not in control of the meter, do not control their customer's operations, and are unable to ensure that the customer will not increase its load. Joint Parties further

contend that the body of D.03-04-057 and the Conclusions of Law contained therein indicate that the calculation, verification and attestation that no increase in DA load would occur were to be solely the responsibility of the DA customer.

Because ESPs have no control over the individual operations of direct access customers, Joint Parties argue, ESPs cannot reasonably be required to attest under penalty of perjury that the change in a customer's location will not result in a net increase in the Customer's aggregate DA load. Joint Parties thus propose that ESPs not be required to attest by affidavit, under penalty of perjury, that the load of customers who transfer their direct access rights from one location to another will not exceed the load at the prior location. Joint Parties argue that such affidavit should be solely the responsibility of the DA customer who controls the load.

Joint Parties thus seek modification of the final sentence of the discussion section of Rule 1. (Also, a stray period at the end of the date specified in that discussion section should be removed.) Joint Parties propose to implement the modification relieving ESPs from the affidavit requirement by dividing the final sentence of the discussion section of Rule 1 into two sentences. The first sentence would make it clear that ESPs were required to sign an affidavit for adding customers to their October 5 and November 1 lists. The second would require the affidavit to be signed solely by the customer, and remove the reference to the ESP signing the required affidavit. Specific modifications proposed to the text of the decision are attached as Exhibit A to the Petition.

Joint Parties also propose that Paragraph 4 be deleted from the ESP Declaration, as they believe this representation is already sufficiently covered by Paragraph 5 of the Customer Declaration.

B. Position of other Parties

SDG&E supports the Petition's proposed modifications to the affidavit and to D.03-04-057. As long as customers make the required attestation and maintain the records required by D.03-04-057, SDG&E submits that this requirement is as unnecessary as it is impracticable.

PG&E agrees that ESPs should not be required to sign an affidavit to the effect that the relocated customer's load will not exceed the customer's load at the prior location because ESPs have little if any control over the operations of their customers. However, PG&E does not believe that ESPs should have no obligation whatsoever in this regard. PG&E proposes instead that ESPs sign a statement saying that after making appropriate inquiries, and based on the ESP's information and belief, the relocated customer's load will not exceed the customer's load at the prior location.

SCE opposes the proposed elimination of the requirement for the ESP to sign the affidavit, arguing that the affidavit requirement in D.03-04-057 is working as intended, and should not be removed. If the Commission decides to change the affidavit requirements, however, SCE suggests alternative language. Rather than deleting the requirement that the ESP attest to the level of its DA customer's load, SCE proposes that it be modified (as indicated by underlined text) to state the following:

After making a reasonable inquiry and investigation of the Customer's Current Location and new location, the ESP represents, on information and belief, that the change in service from the Current Location to the new location will cause no net increase in Customer's aggregate direct access load in effect as of September 20, 2001 for all Customers' facilities that have been relocated or replaced within utility's existing service territory."

In addition, SCE argues that AReM/WPTF's proposed changes to Rule 1 as shown in its Exhibit A.1 would result in unintended consequences to the original intent of the DA Suspension Decision D.02-03-055. By deleting the phrase, "both the ESP and," AReM/WPTF would also relieve ESPs from the legal responsibility of attesting that additions of new customers to the October 5th and November 1st DA lists are in accordance with D.02-03-55. Even AReM/WPTF admits that the ESPs signature on such an affidavit is clearly required (Petition, p. 6).

C. Discussion

We conclude that Joint Parties' proposed modification is reasonable to the limited extent it seeks to relieve the ESP from the requirement to sign an affidavit attesting that there is no net increase in DA load as a result of relocations. ESPs must still attest that additions of new customers to the October 5th and November 1st DA lists are in accordance with D.02-03-55. We agree, however, that ESPs have no control over the individual operations of DA customers, and thus should not be required to attest under penalty of perjury that the change in a customer's location will not result in a net increase in the customer's aggregate DA load. By retaining the requirement that the DA customer attest "under penalty of perjury" that the load has not increased beyond permissible levels, the intent of D.03-04-057 to ensure compliance is preserved.

PG&E, while conceding that some change to the ESP affidavit requirements is warranted, opposes Joint Parties' proposal to relieve ESPs from any attestation responsibility with respect to DA load relocations. SCE also argues that if any modification is granted that ESPs attestation to no load increase be qualified with the clause "on information and belief," rather than "under penalty of perjury." PG&E and SCE claim that maintaining some lesser

requirements on ESPs in this regard will an additional check on “potential gaming” by DA customers relocating load. SCE’s experience has been that because ESPs have the responsibility of signing the affidavit, they have been very careful to work with their customers to ensure that there will be no increase in load as a result of a facility relocation before signing the affidavit.

We are unpersuaded, however, as to the necessity for this additional level of administrative burden on ESPs. The legal requirement that remains on the DA customer is an effective check against the potential for a customer not to comply with the rule. This responsibility entails not only the DA customer’s relationship with the IOU and Commission rules, but also in coordinating any load relocations with its ESP. Thus, we find it inappropriate to add administrative hurdles on business transactions that are unnecessary, and burdensome. Since it is the customer, and not the ESP, that has control over the load, the ESP is not in a position to violate the load restriction requirements since it is the DA customer that controls the level of the load. Thus, it is sufficient that the affidavit requirement with respect to the no load growth attestation be limited to the DA customer, thereby assigning the appropriate legal responsibility for compliance with the DA customer that has power to control the outcome. We shall accordingly adopt the proposed modification in language to eliminate this attestation by ESPs. We shall also eliminate Paragraph 4 from ESP declaration, as requested.

IV. Treatment of Account-by-Account Load Replacements

A. Position of Joint Parties

Joint Parties also propose a modification or clarification of the requirements for determining allowable DA load under the rules adopted in Appendix A of the April 17 Decision. Joint Parties argue that Appendix A

should be interpreted to permit a DA customer to calculate the net change in DA load from all replacements and relocations in facilities within its utility-specific service territory, rather than based merely on an account-by-account interpretation that limits the calculation to a direct one-for-one replacement, as reflected in the utilities' proposed affidavit.

Joint Parties argue that a customer should be permitted to relocate any DA load from an active DA account to a proposed new account so long as there is no net increase across all eligible DA accounts, and that the affidavit adopted by the utilities should be consistent with the proposed modified language to D.03-04-057.

Joint Parties seek modification to permit relocations so long as there is no net increase in the customer's amount of total eligible DA load. Under the proposed approach, eligible DA load would be determined merely by comparing the customer's entire total DA load prior to and after the relocation within each utility service territory, rather than on an account-by-account basis or solely as a comparison of the respective loads of relocated accounts. Thus, Joint Parties propose that Rule 5 in Appendix A and related discussion in the text of the decision be modified to delete the requirement that a customer may relocate DA load to a new location only on a "one-for-one" or "account-by-account" basis.

B. Position of Other Parties

PG&E and SCE oppose the proposed modification seeking to eliminate the "one-for-one" or "account-by-account" restrictions. SCE argues that parties have already had the opportunity to address this precise issue in briefs leading to the adoption of D.03-04-057, and that the Commission specifically adopted the "one-for-one" requirement to ensure that the standstill principle was not violated. PG&E believes that the existing rule already allows significant

flexibility to address the likelihood that the relocation load does not exactly match the relocated load. PG&E argues that if the location-by-location requirement were dropped, it would become impossible to determine if relocations were occurring as proposed to prohibited load shifts that did not involve relocations or replacements.

SDG&E, by contrast, agrees with Joint Parties' proposed elimination of the account-by-account requirement. SDG&E believes that as long as there is no increase in DA load across all of the customer's eligible accounts, there would be no compromise of the standstill principle. Further, SDG&E argues that a strict account-by-account interpretation was exactly **not** what the Commission has in mind (emphasis in original):

“...Albertson's expresses concern that allowing replacement only on a facility-for-facility basis could be problematic if the new location's load were either slightly smaller or slightly larger than its predecessor. We shall address this concern by permitting the DA customer to calculate the **net change** in DA load **from all** replacements and relocations in facilities within its utility-specific service territory. In this manner, if individual replacement facilities are slightly larger than their predecessor's, those loads may be netted against the DA load from other replacement facilities that may be slightly smaller than their predecessor's (or vice versa). The **net effect** of the changes in DA load **for all** such facilities that are relocated or replaced shall not exceed the customer's aggregate DA load in effect for those facilities as of the September 20, 2001, suspension date (D.03-04-057, p.15, emphasis added in SDG&E's comments).”

Finally, SDG&E agrees with the Petition that a customer should be permitted to relocate any DA load from an active account to a proposed new account so long as there is no net increase across all of its eligible accounts. To qualify this accord, SDG&E maintains that, “Once this

concept is understood and implemented, as it would be through the customer's sworn statement, there would be no compromise of the 'standstill principle,' AB 1X's suspension of DA, and no harm to bundled customers."²

C. Discussion

We grant the proposed modification to remove the "account-by-account" language in D.03-04-057, as proposed by Joint Parties. In D.03-04-057, we did not intend to require a one-for-one or account-by-account correspondence for relocated DA accounts. Rather, we clearly intended to allow for netting of DA load. As we stated: "We [the Commission] agree that modifications to D.02-03-055 are appropriate in order to account for normal changes in business operations, provided that there be no resulting net increase in each business customer's DA load."³ We note the language that was added to Appendix A, Rule 5 of D.03-04-057 established our intent to permit no net increase in load. This was a fundamental theme throughout D.03-04-057.

Furthermore, D.03-04-057 inadvertently contains two conflicting findings of fact ("FOF"). In FOF#5, the Commission stated:

"The risk that the DA load suspension levels might be exceeded under Albertson's proposed modification can be addressed by adding restrictions requiring a customer to obtain DA service only for new facilities that represent a replacement and/or relocation of existing facilities only on a "one-for-one" or "account-by-account" basis."⁴

² SDG&E response to the petition for modification of Albertson's, Inc., Alliance for Retail Energy Markets and Western Power Trading Forum regarding D.03-04-057, pps. 2-3

³ D.03-04-057, p. 13

⁴ D.03-04-057, p. 21

Yet in FOF#7, the Commission found that:

“By permitting the DA customer to calculate the net change in DA load from all replacements and relocations in facilities within its utility-specific service territory, individual variations between old and replacement facilities can be accommodated, as long as there is no increase in the total net DA load between all of the original and their replacement facilities.”⁵

Based on the above, FOF#5 and FOF#7 are clearly inconsistent. After a review of D.03-04-057, we believe that the inclusion of FOF#5 was incorrect. A full reading of D.03-04-057, bolstered by the reasons discussed herein, demonstrates that the Commission’s intent was to permit relocations and replacements of facilities as long as there is no increase in the total net DA load between **all of the original and their replacement facilities**. We therefore agree with the Joint Parties and modify D.03-04-057 to remove the inconsistent FOF#5. Thus, D.03-04-057 shall read as intended, namely to permit DA customers to relocate any DA load from an active DA account to a proposed new account so long as there is no net increase across all eligible DA accounts. It should also be noted, however, that the process of relocation and/or replacement of existing load to different accounts must in no way be construed as a relaxation or compromise of our previously adopted DA suspension requirements. The affidavits adopted by the utilities should be consistent with the modified language of D.03-04-057.

⁵ *ibid*

In addition, PG&E in its comments⁶ states that, “PG&E understands the AD’s [Alternate Draft’s] proposal to mean that a customer’s DA load as of September 20, 2001 is like an entitlement to be allocated to any existing or new DA accounts as the customer pleases. For example, a customer could use the slow down of business at one or more locations to open new DA accounts elsewhere to make up for the reduced load at the existing facilities. In other words, shut down of an account is not required in order to “replace” or “relocate” load under DA.

PG&E’s concerns are taken into consideration, but we feel this is not an issue before us today. In fact, Conclusion of Law (“COL”) #5 of D.03-04-057 expressly states that,

“5. The DA customer may not add new DA load where there is no offsetting reduction in load due to relocated or replaced facilities within the utility’s service territory, **or merely to make up for reduced DA consumption at its other facilities that continue to operate.**” (emphasis added)

Thus, the Commission has already articulated that a slow down in business is not a justification for opening a new location. Furthermore, the Commission has stated that, “Only replacements or relocations of facilities shall be eligible for DA treatment, as opposed to any new facilities that

⁶ “Comments of Pacific Gas and Electric Company on alternate decision of Commissioner Kennedy regarding replacements and relocations of direct access accounts,” dated January 16, 2004. p. 3

cause a net increase in DA load above September 20, 2001 suspension levels.”⁷

Finally, we reiterate our agreement with SDG&E that: “Once this concept is understood and implemented, as it would be through the customer’s sworn statement, there would be no compromise of the ‘standstill principle,’ AB 1X’s suspension of DA, and no harm to bundled customers.”⁸

V. Comments on Draft Decision

The initial Draft Decision of Administrative Law Judge Thomas R. Pulsifer in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Pub. Util. Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on December 19, 2003, and reply comments were filed on December 29, 2003.

VI. Assignment of Proceeding

Carl W. Wood and Geoffrey F. Brown are the Assigned Commissioners and Thomas R. Pulsifer is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. ESPs are required to sign an affidavit, pursuant to D.03-04-057 that the change in a customer’s location will not result in a net increase in the Customer's aggregate DA load.

⁷ D.03-04-057, p. 15

⁸ SDG&E response to the petition for modification of Albertson’s, Inc., Alliance for Retail Energy Markets and Western Power Trading Forum regarding D.03-04-057, p. 3

2. Because ESPs have no control over the individual operations of direct access customers, they cannot reasonably ascertain whether the change in a customer's location will result in a net increase in the Customer's aggregate DA load.

3. By retaining the requirement that the DA customer attest "under penalty of perjury" that the load has not increased beyond permissible levels, the intent of D.03-04-057 to ensure compliance is preserved.

4. The allowance for a customer to be permitted to relocate any DA load from an active account to a proposed new account is granted in order to account for normal changes in business operations, provided that there be no resulting net increase in each business customer's DA load.

5. The process of relocation and/or replacement of existing load to different accounts must in no way be construed as a relaxation or compromise of our previously adopted DA suspension requirements.

6. No party requested evidentiary hearings.

Conclusions of Law

1. The Petition to Modify should be granted, to the extent it seeks to eliminate the affidavit requirement applicable to ESPs.

2. The Petition to Modify should be granted, to the extent that it seeks to eliminate the account-by-account documentation for load changes associated with relocated and replacement facilities eligible to be treated as DA load.

O R D E R

IT IS ORDERED that:

1. The Petition to Modify Decision (D.) 03-04-057 is granted to the extent that it seeks to eliminate the requirement for the ESP to sign an affidavit attesting that the level of a customer's DA load does not exceed permissible levels. The following text modification of the Rule 1 as set forth in D.03-04-057, Appendix A, page 3 is accordingly adopted, limiting such attestation requirements to the DA customer (with additions underlined, and deletions struck through):

We will allow additions to the October 5th and November 1st lists [footnote omitted] for customers with a valid direct access contract as of September 20, 2001 (including additional meters, accounts or sites as provided in Rules 5 and 6 below), using the AReM process, along with an affidavit signed by the customer stating under penalty of perjury that the contract date is correct. A separate affidavit, signed by the customer, must state under penalty of perjury that the amount of customer-specific aggregate direct access load for facilities that have been relocated or replaced within the customer's existing service territory that is related to the new meters, accounts or sites does not exceed that in effect as of September 20, 2001, and that the DA customer's load will not increase by virtue of such relocation or replacement of facilities.

2. Paragraph 4 of the ESP Declaration is likewise hereby deleted. The amended ESP Declaration, with the deleted text struck through is set forth in the Appendix of this order.

3. It is appropriate to clarify the intent of the relocation and replacement process adopted in D.03-04-057 to allow relocations and replacements so as long as there is no increase in the total net DA load between all of the original and their replacement facilities.

4. The Petition to Modify is also granted, to the extent it seeks to eliminate the requirement for an account-by-account verification with respect to the requirements for permitting DA load relocations and replacements. The following text modification of the Rule 5 as set forth in D.03-04-057, Appendix A, page 3 is accordingly adopted

A direct access customer may relocate to a new location ~~only on a “one for one” or “account by account” basis~~ within its existing service territory, or rebuild at that customers existing location provided: (1) the replacement or relocation is in the normal course of business, and (2) that there is no net increase in that customer’s total direct access load from all such facilities that were eligible to be served by direct access within its utility-specific service territory between all of the original facilities that were eligible to be served by direct access as of September 20, 2001 and the replacement or relocation facilities.

This order is effective today.

Dated February 11, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President

GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I reserve the right to join in Commissioner Wood’s Dissent
/s/ LORETTA M. LYNCH
Commissioner

I will file a dissent
/s/ CARL W. WOOD
Commissioner

Appendix
Adopted Modifications to
Customer Relocation/Replacement Declaration

1. ESP Declaration

I, _____, state as follows:

1. I am an officer of _____ (*Name of ESP*) ("ESP") authorized to make this declaration. I have personal knowledge of the matters set forth herein and if called upon as a witness could and would testify competently thereto.
2. Under the provisions of the Agreement, the Customer has the right to receive direct access service from ESP for electric service loads located at the Current Location service address under the service accounts identified below and at the New Location. "Current Location" means a single existing customer site where the electric load of one or more customer accounts is currently being served under direct access, or is eligible for direct access service. "New Location" means either (1) the Current Location site after the facilities have been refurbished, reconstructed or remodeled or (2) a different site from the Current Location which has been acquired by customer for the purpose of, or at which the customer has engaged in new construction for the purpose of, accommodating the relocated business and operations from the Current Location.
3. All conditions of the Agreement necessary for a transfer of electric service from Customer's Current Location to New Location have been satisfied, including any necessary approvals by ESP.
4. ~~The change in service from the Current Location to the new location will cause no net increase in Customer's aggregate direct access load in effect as of September 20, 2001 for all Customers' facilities that have been relocated or replaced within utility's existing service territory.~~

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ____ day of _____,
_____ at _____, _____ [city, state].

_____ [signature]

_____ [title]